Tan Kim Hor & Ors v Tan Heng Chew & Ors

COURT OF APPEAL (KUALA LUMPUR) — CIVIL APPEAL NO W-03-45 OF 2001

ABDUL HAMID MOHAMAD, RICHARD MALANJUM AND ARIFIN ZAKARIA JJCA

29 JANUARY 2003

Civil Procedure *— Appeal — Fact, finding of — Findings not supported by evidence — Findings made based on judge's perceptions of the situation without benefit of probable explanations from contending parties — Whether High Court judge was wrong in her findings*

Civil Procedure *— Striking out — Winding up petition — Application to strike out winding up petition under O 18 r 19 of the Rules of the High Court 1980 — Whether application pursuant to O 18 r 19 to strike out petition presented under s 218 of the Companies Act 1965 desirable or applicable*

Companies and Corporations *— Winding up — Petition under s 218 — Application to strike out winding up petition under O 18 r 19 of the Rules of the High Court 1980 — Whether application pursuant to O 18 r 19 to strike out petition presented under s 218 of the Companies Act 1965 desirable or applicable*

The petitioners filed a petition to wind up the ninth respondent, a private limited company, on the ground that it was just and equitable pursuant to s 218(1)(i) of the Companies Act 1965 ('the Act'). The respondents applied to strike out the petition pursuant to O 18 r 19(1)(a), (b) or (d) of the Rules of the High Court 1980 ('the RHC') and/or under the inherent jurisdiction of the court on the ground that it was an abuse of process of the court. The learned High Court judge held that the petition was an abuse of process and that there was no ground shown that satisfied the requirement of just and equitable ground to wind up the ninth respondent. This was an appeal by the petitioners against the decision of the learned High Court judge.

Held, allowing the petitioners' appeal:

(1) An application made pursuant to O 18 r 19 of the RHC to strike out a petition presented under s 218 of the Act was undesirable and should be discouraged. The use of that procedure in such winding up proceeding produced only delay in the adjudication of the matter. However, this did not mean that O 18 r 19 of the RHC was totally inapplicable. There may be an instance where such a petition was obviously unsustainable for want of cause of action or that it was plainly vexatious or frivolous or even an abuse of process. In such a case, O 18 r 19 of the RHC could be resorted to. The background facts of each case were relevant to determine whether a striking out application was appropriate (see p 502A–C); *Filotek Trading Sdn Bhd v Buildcon-Cimaco Concrete Sdn Bhd* [1999] 4 MLJ 268 followed.

(2) On the issue of inherent jurisdiction of the court to strike out the petition, the failure on the part of the learned High Court judge to indicate the source thereof was not ipso facto a sufficient ground to reverse her decision. Such shortcoming in the judgment was similar to a failure to cite the relevant provision of law or rules. In any case, the courts had the inherent jurisdiction at common law to strike out a petition (see p 502E–F); *Megat Najmuddin bin Dato Seri (Dr) Megat Khas v Bank Bumiputra (M) Bhd* [2002] 1 MLJ 385 followed.

(3) Although the learned High Court judge appreciated that findings of facts would be necessary to determine whether there was any justification to wind up the ninth respondent on just and equitable ground, she then proceeded to make findings that were based on her perceptions of the situation and on a literal reading of the exhibits annexed to the affidavits filed without the benefit of probable explanations from the contending parties. Further, nowhere in her decision did the learned judge point to any part of the petition or affidavits filed in support which she found to have failed to satisfy the requirements of the 'just and equitable' principle (see pp 503E–F, 504D–F, H–I).

(4) The learned High Court judge was also concerned with the affairs of the public listed companies in which the ninth respondent had interests. It was only the ninth respondent that would be affected if a winding up order was granted. There was a failure by the court below to consider the true nature of the ninth respondent. A company, whether private or public, had its own legal entity. Thus any dispute amongst the shareholders of a holding company should not be assumed as having adverse repercussion on the companies in which it was a shareholder. Accordingly, it was premature or even presumptuous to make the findings, conclusions and inferences as the court below did when it was only at an interlocutory stage (see pp 505G, 506B–D); *Tuan Hj Ishak bin Ismail & Ors v Leong Hup Holdings Bhd and other appeals* [1996] 1 MLJ 661 and *Dato' Ibrahim bin Hj Ismail & Anor v Onstream Marine Sdn Bhd & Ors* [1998] 4 MLJ 86 distinguished.

(5) The approach taken by the learned judge in evaluating the affidavits filed to come to her conclusions or findings was quite disturbing. It was tantamount to conducting a trial by affidavits which should not be the case. It is allowable for the court even at an interlocutory stage to examine affidavit evidence and to come to certain finding where 'such assertion, denial or dispute is equivocal, or lacking in precision or is inconsistent with undisputed contemporary documents or other statements by the same deponent, or is inherently improbable in itself, then the judge has a duty to reject such assertion or denial, thereby rendering the issue not triable' (per Mohd Azmi SCJ at p 408 in *Bank Negara Malaysia v Mohd Ismail & Ors* [1992] 1 MLJ 400) (see pp 506H–507B).

(6) The summary procedure under O 18 r 19(1) of the RHC can only be adopted when it can be clearly seen that a claim or answer was on the face of it 'obviously unsustainable'. It cannot be exercised by a minute examination of the documents and facts of the case. This principle was also true in the case of the exercise of the court's inherent jurisdiction to strike out a claim (see p 507C–F).

[Bahasa Malaysia summary

Pempetisyen-pempetisyen telah memfailkan satu petisyen untuk menggulung responden kesembilan, sebuah syarikat sendirian berhad, atas alasan bahawa ia adalah adil dan saksama menurut s 218(1)(i) Akta Syarikat 1965 ('Akta tersebut'). Responden-responden telah memohon untuk membatalkan petisyen tersebut menurut A 18 k 19(1)(a), (b) atau (d) Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT') dan/atau di bawah bidang kuasa sedia ada mahkamah atas alasan bahawa ia adalah satu penyalahgunaan proses mahkamah. Hakim Mahkamah Tinggi yang bijaksana telah memutuskan bahawa petisyen tersebut adalah satu penyalahgunaan proses dan tiada alasan ditunjukkan yang memenuhi keperluan alasan adil dan saksama untuk menggulungkan responden kesembilan. Ini adalah satu rayuan oleh pempetisyen-pempetisyen terhadap keputusan hakim Mahkamah Tinggi yang bijaksana.

Diputuskan, membenarkan rayuan pempetisyen-pempetisyen tersebut:

(1) Satu permohonan yang dibuat menurut A 18 k 19 KMT untuk membatalkan petisyen yang dikemukakan di bawah s 218 Akta tersebut adalah tidak diingini dan tidak patut digalakkan. Penggunaan prosedur tersebut dalam prosiding penggulungan hanya menyebabkan kelewatan dalam penghukuman perkara tersebut. Namun begitu, ini tidak bermakna A 18 k 19 KMT langsung tidak terpakai. Mungkin terdapat keadaan di mana suatu petisyen nyata tidak boleh dibenarkan oleh kerana inginkan kausa tindakan atau ia adalah nyata menyusahkan atau remeh ataupun satu penyalahgunaan proses. Dalam kes sedemikian, A 18 k 19 KMT boleh diambil sebagai jalan keluar. Latar belakang fakta-fakta setiap kes adalah relevan untuk menentukan sama ada satu permohonan pembatalan adalah sesuai (lihat ms 502A–C); *Filotek Trading Sdn Bhd v Buildcon-Cimaco Concrete Sdn Bhd* [1999] 4 MLJ 268 diikut.

(2) Berhubung persoalan bidang kuasa sedia ada mahkamah untuk membatalkan petisyen tersebut, kegagalan di pihak hakim Mahkamah Tinggi yang bijaksana untuk menunjukkan sumber tersebut adalah bukan ipso facto satu alasan untuk mengakaskan keputusan beliau. Kelemahan penghakiman sedemikian adalah sama dengan satu kegagalan untuk memetik satu peruntukan undang-undang atau kaedah-kaedah yang relevan. Dalam apa

pun kes, mahkamah-mahkamah mempunyai bidang kuasa sedia ada dalam common law untuk membatalkan satu petisyen (lihat ms 502E–F); *Megat Najmuddin bin Dato Seri (Dr) Megat Khas v Bank Bumiputra (M) Bhd* [2002] 1 MLJ 385 diikut.

(3) Walaupun hakim Mahkamah Tinggi yang bijaksana meyedari bahawa penemuan-penemuan fakta-fakta adalah perlu untuk menentukan sama ada terdapat apa-apa justifikasi untuk menggulungkan responden kesembilan atas alasan yang adil dan saksama, beliau kemudiannya telah membuat penemuan-penemuan yang berdasarkan atas tanggapan beliau tentang keadaan tersebut dan dengan satu pembacaan secara harfiah ke atas ekshibit-ekshibit yang dilampirkan kepada afidavit-afidavit yang difailkan tanpa apa-apa kelebihan tentang penjelasan-penjelasan yang mungkin daripada pihak-pihak yang bertanding. Tambahan pula, tidak dijumpai di mana-mana dalam keputusan beliau di mana hakim yang bijaksana tersebut telah menunjukkan kepada mana-mana bahagian petisyen atau afidavit-afidavit yang difailkan sebagai sokongan yang beliau dapati telah gagal untuk memenuhi keperluan-keperluan prinsip 'just and equitable' (lihat ms 503E–F, 504D–F, H–I).

(4) Hakim Mahkamah Tinggi yang bijaksana juga mengambil berat tentang urusan-urusan syarikat-syarikat tersenarai awam di mana responden kesembilan mempunyai kepentingan. Hanya responden kesembilan yang akan terjejas jika satu perintah penggulungan diberikan. Terdapat satu kegagalan oleh mahkamah bawahan untuk menimbangkan sifat sebenar responden kesembilan. Satu syarikat, sama ada sendirian berhad atau berhad, mempunyai entiti undang-undang sendiri. Oleh itu, apa-apa pertikaian di antara pemegang-pemegang saham satu syarikat pemegang saham tidak boleh dianggap sebagai mempunyai satu akibat yang bertentangan ke atas syarikat-syarikat yang mana ia adalah pemegang saham. Sewajarnya, ia adalah pra masa ataupun hanya andaian untuk membuat penemuan-penemuan, kesimpulan-kesimpulan dan inferens-inferens sebagaimana yang telah dilakukan oleh mahkamah bawahan apabila ia hanya di peringkat interlokutori (lihat ms 505G, 506B–D); *Tuan Hj Ishak bin Ismail & Ors v Leong Hup Holdings Bhd and other appeals* [1996] 1 MLJ 661 dan *Dato' Ibrahim bin Hj Ismail & Anor v Onstream Marine Sdn Bhd & Ors* [1998] 4 MLJ 86 dibeza.

(5) Pendekatan yang diambil oleh hakim yang bijaksana semasa meneliti afidavit yang difailkan untuk tiba pada kesimpulan atau penemuan beliau amat membimbangkan. Ia sama seperti mengendalikan satu perbicaraan melalui afidavit-afidavit yang tidak sepatutnya berlaku. Ia dibenarkan untuk mahkamah di peringkat interlokutori lagi untuk memeriksa keterangan afidavit dan tiba kepada suatu penemuan di mana 'such assertion, denial or dispute is equivocal, or lacking in precision or is inconsistent with undisputed contemporary documents or other statements by

the same deponent, or is inherently improbable in itself, then the judge has a duty to reject such assertion or denial, thereby rendering the issue not triable' (oleh Mohd Azmi SCJ di ms 408 dalam *Bank Negara Malaysia v Mohd Ismail & Ors* [1992] 1 MLJ 400) (lihat ms 506H–507B).

(6) Prosedur terus di bawah A 18 k 19(1) KMT hanya boleh dipakai apabila ia boleh dilihat dengan jelas bahawa satu tuntutan atau jawapan adalah pada dasarnya 'obviously unsustainable'. Ia tidak boleh digunakan melalui satu pemeriksaan yang terperinci ke atas dokumen-dokumen dan fakta-fakta kes. Prinsip ini juga benar dalam kes yang menggunakan bidang kuasa sedia ada mahkamah untuk membatalkan satu tuntutan (lihat ms 507C–F).]

Notes

For cases on finding of fact, see 2 *Mallal's Digest* (4th Ed, 2001 Reissue) paras 729–812.

For cases on petition under s 218, see 3 *Mallal's Digest* (4th Ed, 2000 Reissue) paras 1049–1059.

For cases on winding up petition, see 2 *Mallal's Digest* (4th Ed, 2001 Reissue) paras 5646–5650.

Cases referred to

AG of Duchy of Lancaster v L & NW Rly Co [1892] 3 Ch 274 (refd)

Bandar Builder Sdn Bhd & Ors v United Malayan Banking Corporation Bhd [1993] 3 MLJ 36 (refd)

Bank Negara Malaysia v Mohd Ismail & Ors [1992] 1 MLJ 400 (refd)

Dato' Ibrahim bin Hj Ismail & Anor v Onstream Marine Sdn Bhd & Ors [1998] 4 MLJ 86 (distd)

Ebrahimi v Westbourne Galleries Ltd [1973] AC 360 (refd)

Eng Mee Yong & Ors v Letchumanan [1979] 2 MLJ 212 (refd)

Fairview Schools Bhd v Indrani a/p Rajaratnam & Ors (No 1) [1998] 1 MLJ 99 (refd)

Filotek Trading Sdn Bhd v Buildcon-Cimaco Concrete Sdn Bhd [1999] 4 MLJ 268 (folld)

Hubbuck & Sons Ltd v Wilkinson, Heywood & Clark Ltd [1899] 1 QB 86 (refd)

Maril-Rionebel (M) Sdn Bhd & Anor v Perdana Merchant Bankers Bhd and other appeals [2001] 4 MLJ 187 (refd)

Megat Najmuddin bin Dato Seri (Dr) Megat Khas v Bank Bumiputra (M) Bhd [2002] 1 MLJ 385 (folld)

(Saul D) Harrison & Sons Plc, Re [1995] 1 BCLC 14 (refd)

Sugumar Balakrishnan v Pengarah Imigresen Negeri Sabah & Anor [1998] 3 MLJ 289 (refd)

Tuan Hj Ishak bin Ismail & Ors v Leong Hup Holdings Bhd and other appeals [1996] 1 MLJ 661 (distd)

Wenlock v Moloney & Ors [1965] 1 WLR 1238; [1965] 2 All ER 871 (refd)

Legislation referred to

Companies Act 1965 s 218(1)(i)
Rules of the High Court 1980 O 18 r 19(1)(a), (b), (d)

Appeal from: Companies Winding Up Petition No D2–28–507 of 2001 (High Court, Kuala Lumpur)

Cecil Abraham (*Dato' Mohd Shafee Abdullah, Dhinesh Bhaskaran, Azahar Azizan Harun, Walter Prepreira* and *Yee Mei Ken* with him) (*Kamarudin & Partners*) for the appellants/petitioners.

Lim Kian Leong (*Low Chi Chneg, Neela Iadurey* and *SM Sia* with him) (*Lim Kian Leong & Co*) for the respondents.

Richard Malanjum JCA (delivering judgment of the court):

Introduction

This is an appeal by the appellants (the petitioners in the court below) ('the petitioners') against the decision of the High Court rendered on 9 October 2001 striking out their petition (as amended) on the application by the respondents (the respondents in the court below) ('the respondents'). The main relief sought for in the petition is for an order to wind up the ninth respondent herein on the ground that it is just and equitable pursuant to s 218(1)(i) of the Companies Act 1965 ('the Act').

The petition was filed on 21 May 2001 and fixed for hearing on 16 August 2001. Affidavits in support of the petition as well as in opposition were also filed. And in the interim, the respondents by a notice of motion dated 15 June 2001 applied for the order to strike out the petition pursuant to O 18 r 19(1)(a), (b) or (d) of the Rules of the High Court 1980 ('the RHC') and/or under the inherent jurisdiction of the court on the ground that it was an abuse of process of the court. Meanwhile on 18 July 2001, the petitioners obtained an order to amend the petition.

The hearing of the notice of motion was fixed on 27 July 2001 with the end result as alluded to hereinabove.

The background facts

From the petition as amended and the several affidavits filed by the contesting parties, some undisputed facts can be discerned. They have been set out in chronological order by the court below. Hence, it will suffice if the gist is reproduced herein as follows:

(1) Tan Chong & Co was founded in the early 1930s by the patriarch Tan Chong as a sole proprietorship.

(2) In 1946 or thereabout, a partnership of Tan Chong & Co ('TC & Co') was founded with the partners being the late Tan Chong and his two sons, namely the first petitioner and his brother, the late Tan Sri Tan Yuet Foh, the father of the first respondent. The business was in food supply.

(3) Over the years, the business of the partnership flourished and the brothers saw an opportunity in the automobile business. The end result was that the partnership became the distributor for Nissan and Datsun cars in addition to the then existing business of food supply.

(4) On 16 February 1959, Tan Chong & Sons Motor Company Sdn Bhd ('TCM') was incorporated to carry out the automobile business. The first subscribers and directors were the two brothers.

(5) The food supply business remained with TC & Co.

(6) The automobile business expanded and diversification of the business came into being. TCM went into car rentals, distribution of commercial vehicles and industrial equipment and tour and travel services. There was therefore a necessity to incorporate several companies to accommodate the various businesses.

(7) There was also a regional expansion of the business with the setting up of companies in nearby Singapore as for instance in 1966 the Tan Chong & Sons Motor Company (Singapore) Private Limited ('TCCS') was established while in 1968 the Singapore Automotive Industries Private Limited ('SAI') was acquired.

(8) With the expansion of the business came the involvement of the younger generation of the family to assist the older members in the management.

(9) Then there was the next move to go public but with the caution that the Tan Chong family must continue to be in controlling position.

(10) To achieve that plan the family was advised to set up an investment holding company to be a holder of a controlling stake of shares in the company that would be public listed. And it was also planned that only members of the Tan Chong family would be the shareholders of the proposed investment holding company. In effect, the Tan Chong family would continue to dominate the intended public listed company.

(11) On 4 October 1972, beginning as a private company the Tan Chong Motor Holdings Berhad ('TCMH') was established. It became a public listed company on 1 September 1973. With the establishment of TCMH, the other companies of the family including TCM were acquired by TCMH.

(12) Meanwhile on 7 June 1973, the ninth respondent was set up for the purpose as set out hereinabove. The first subscribers and directors were the first petitioner and the late Tan Sri Tan Yuet Foh on the equity ratio of 50:50 respectively. Subsequently, this ratio was changed to 44.583:55.417 with Tan Sri Tan Yuet Foh having the larger portion. Now up to this point, there is no dispute of facts in this case. However, as to what prompted in the change of the ratio is quite contentious depending who is giving the version.

(13) To continue with the course of event it would appear from the records of the affairs of the ninth respondent that on 16 June 1973 it resolved to purchase 9,230,000 shares of RM1 each from the shareholders of

TCMH before its conversion into a public listed company. The shareholders purchased from were Tan Yuet Foh for 5,111,000 shares and the first petitioner for 4,115,000 shares respectively. In turn the ninth respondent in two instalments allotted the purchased shares to the respective family members of Tan Yuet Foh and the first petitioner with the net result that as at 28 August 1974 the family members of the former were in control of 55.417% of the shares in the ninth respondent while the balance of the shares were with the family members of the first petitioner. That ratio remains up to this day.

(14) The demise of Tan Sri Tan Yuet Foh on 8 October 1985 saw the passing of leadership in his family to the first respondent but the arrangement in the management of the business by the two families remained as before the death save that the key figures of the families were the first petitioner and the first respondent.

(15) Steps were then proposed to reorganize the business structure of the several companies in which the two families had controlling shares through the ninth respondent. One of them was the demerger exercise of TCMH into three public listed companies each with specialized business activities. But to achieve that goal the participation of the ninth respondent being the largest single shareholder in TCMH was crucial. And it was for the two families to determine being the shareholders in the ninth respondent.

(16) As to what transpired in order to secure the participation of the ninth respondent the parties herein have diverging versions. And added to that were also the allegations and counter-allegations of the two families as deposed to in the various affidavits filed by both sides particularly in the conduct of their business relationships. We will consider later on in this judgment whether any finding should be made upon any of these charges and counter-charges at the stage of striking out application.

The foregoing is the sequence of events outlining the business foray of the two Tan Chong families which was begun by the patriarch Tan Chong as a humble sole proprietorship.

Now before it is overlooked, it is important to note that the ninth respondent which the petitioners are seeking for an order to wind up is a private limited company. Its only link to the companies aforementioned is that it is a single substantial shareholder in those companies.

The decision of the High Court

In the court below the petitioners raised one preliminary objection to the application of the respondents contending that O 18 r 19 of the RHC was inapplicable to strike out the petition. But after hearing the respective arguments advanced by learned counsel for the parties the court dismissed the preliminary objection and then proceeded to hear the application proper. The petitioners are appealing against the dismissal of the preliminary objection.

Now in approaching the application proper, the learned judge accepted the legal principle that it is a question of fact whether or not to wind up a company and that each case has to be decided on its own particular facts. The learned judge also noted that the petitioners were seeking for equitable relief alleging breakdown in the mutual trust and confidence between the two families whilst the respondents denied such assertion. And the learned judge went on in great details to examine and consider as well as making observations thereto on what were alleged and counter-alleged by the contesting parties hereto.

Further, in coming to her decision on the merit of the striking out application, the learned judge examined and considered the respective grounds submitted.

There was also a procedural objection to the petition itself raised by the respondents in the striking out application. But there is no appeal against the dismissal of that objection. Hence, we are of the view that there is no necessity for us to deal with that part of the decision of the court below.

In short, the gist of the decision of the learned judge is that the petition is an abuse of process and there is no ground shown that satisfy the requirement of just and equitable ground to wind up the ninth respondent.

The grounds of appeal, contentions of the parties and findings of the court

Before us, the petitioners submitted 19 grounds against the decision of the court below. But basically, the grievances may be summarized into few categories, namely:

(1) the failure to determine:
   (a) the source of the jurisdiction when relying on the inherent power to strike out the petition; and
   (b) that the application of the respondents itself was an abuse of the process of the court;
(2) that it was not appropriate for finding of facts to be made as the learned judge in this case did in a striking out application;
(3) that there was a failure to properly consider the 'just and equitable' principles as a ground to wind up a company;
(4) that there was a failure to properly consider the principles of 'quasi partnership' based on the historical background and the facts of the case; and
(5) that there was a failure to properly consider the principles applicable in a striking out application.

The other subsidiary points raised were the assertion that the learned judge took into account irrelevant matters in coming to her decision and the finding of the court that the complaint was only against the first respondent and not against the other respondents.

In our view however and subject to our first consideration of whether a striking out application is available or desirable in a company's winding up

petition under s 218 of the Act, the main question to address should be whether the learned judge in the court below was correct in striking out the petition on the basis as given.

The source of power to strike out the petition

Before us, learned counsel for the petitioners submitted that this court should 'determine and put to rest the issue of applicability of the Rules of the High Court to winding up proceedings'. Such argument included as in the present case the practice of relying on O 18 r 19 of the RHC to strike out a petition under s 218 of the Act.

Now, there are strong views expressed by our courts of the undesirability to adopt a striking out procedure in a winding up petition under s 218 of the Act since it could cause further delay rather than expedite the disposal of such matter. In the case of *Filotek Trading Sdn Bhd v Buildcon-Cimaco Concrete Sdn Bhd* [1999] 4 MLJ 268, Abdul Hamid Mohamed J (as he then was) expressed his view in this way at p 276:

> First, are the RHC 1980 not applicable at all?
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> The strongest argument against the application of the RHC 1980 is the provision of O 1 r 2(2), of the RHC 1980 itself.
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> Besides, the Companies (Winding up) Rules 1972 provides its own scheme of procedure for a s 218 winding up petition which is more simplified and geared for speedy disposal. RHC 1980, for example, provide for appearance (conditional and unconditional), discoveries, interrogatories, judgment in default of pleading, summary judgment (O 14), striking out of pleadings (O 18 r 19), summons for direction and setting down for trial. Hearing date is only given after the directions made in the summons for direction are complied with and the case has been set down for trial. Perhaps because of these requirements which take some time to be complied since the filing of a writ, that procedures for judgment in default of pleading, summary judgment and the striking out of the writs and pleadings are provided, for quick disposal in clear-cut cases.
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> The scheme under the Companies (Winding up) Rules 1972 is different. When the petition is issued out of court, a hearing date is given straight away. Whatever has to be done, eg service, advertisement, compliance with r 32, will have to be done before the hearing date. The court is supposed to hear the petition straight away on the date fixed for hearing, the very first time it comes up before it. If everything is done as scheduled, the petition is heard on the date first fixed for hearing. That is what the rules envisage. In the circumstances, there is no necessity for provision for judgment in default, summary judgment or striking out the pleading or trial on issues. I am of the view that that is the reason why the Companies (Winding up) Rules 1972 do not provide for such procedures. They are not necessary.
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> Furthermore, more often than not, resort to O 18 r 19 of the RHC 1980 in a winding-up proceedings results in the delay in the hearing of the petition. The application is usually filed one or two weeks before the date fixed for the hearing of the petition. Application is made for it to be heard first, supposedly, to save the court's time. In reality, it delays the hearing of the petition. Whenever there is such an application, inevitably, the hearing of the petition is delayed. Not only will the petition be adjourned for the application to be heard first, but if dismissed, there will be an appeal to the higher court(s).

(See also *Maril-Rionebel (M) Sdn Bhd & Anor v Perdana Merchant Bankers Bhd and other appeals* [2001] 4 MLJ 187 (CA); *Fairview Schools Bhd v Indrani a/p Rajaratnam & Ors (No 1)* [1998] 1 MLJ 99 (CA). A

We find the philosophy implicit in the above statements convincing and adopt it in affirming the view that an application made pursuant to O 18 r 19 of the RHC to strike out a petition presented under s 218 of the Act is undesirable and should be discouraged. In our view, the use of that procedure in such winding up proceeding produces only delay in the adjudication of the matter. Of course, we are not saying that it is totally inapplicable. There may be an instance where such a petition is obviously unsustainable for want of cause of action or that it is plainly vexatious or frivolous or even an abuse of process. In such a case, O 18 r 19 could be resorted to. Accordingly, we cannot therefore fully accede to the request of learned counsel for the petitioners. In our view, the background facts of each case are relevant to determine whether a striking out application is appropriate. For instance in the present case, we find that there are matters that cannot be disposed of summarily yet the learned judge in the court below found them as facts. We will elaborate this point later on in this judgment. B C D

And for the same foregoing reason, we do not agree with learned counsel for the petitioners that a mere application to strike out a petition under s 218 of the Act is an abuse of process. Such a ground of appeal has therefore no merit.

On the issue of inherent jurisdiction of the court, we do not think that the failure on the part of the learned judge to indicate the source thereof ipso facto a sufficient ground to reverse her decision. In our view, such shortcoming in the judgment is similar to a failure to cite the relevant provision of law or rules. And be that as it may, the crucial question is whether our courts have the inherent jurisdiction at common law. In our opinion, the answer is in the affirmative. Such a view has been continuously upheld by our courts and reaffirmed in the recent case of *Megat Najmuddin bin Dato Seri (Dr) Megat Khas v Bank Bumiputra (M) Bhd* [2002] 1 MLJ 385. Indeed in that case Steve Shim CJ (Sabah & Sarawak) said, inter alia, at p 401: E F

> In addition, I take the view that the Federal Court also has the inherent jurisdiction under the common law to deal with cases with a view to preventing injustices in limited circumstances. This is clearly in line with s 3(1)(a) of the Civil Law Act 1956, which was promulgated in accordance with cl (c) of art 121(2) of the Constitution which confers on the Federal Court 'such other jurisdiction as may be conferred by or under federal law'. G
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> Section 3(1)(a) under the heading 'Application of UK Common Law, rules of equity and certain statutes', states as follows: H
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> > 'Save so far as other provision has been made or may hereafter be made by any written law in force in Malaysia, the court shall —
> >
> > (a) in West Malaysia or part thereof, apply the common law of England and the rules of equity as administered in England on 7 April 1956 ... I
> >
> > Provided always that the said common law, rules of equity and statutes of general application shall be applied so far only as the circumstances of the

States of Malaysia and their respective inhabitants permit and subject to such qualification as local circumstances render necessary.'

In 1956, the common law of England clearly recognized the superior courts as having inherent jurisdiction to deal with issues of injustice in certain cases (see *Halsbury's Law of England* (4th Ed) Vol 37 para 14).

(See also the decision of this court in *Sugumar Balakrishnan v Pengarah Imigresen Negeri Sabah & Anor* [1998] 3 MLJ 289).

Findings of facts — just and equitable and quasi-partnership and the principles applicable in a striking out application

To elaborate what we have said earlier on, it is our finding after reading the judgment of the court below that several findings, inferences or conclusions were made which encompassed, inter alia, the points of whether there was any basis to petition for the winding up of the ninth respondent on just and equitable ground and whether the relationship of the contending parties had been on quasi-partnership.

In respect of the first point, it was the view of the learned judge that:

(T)he petition which is premised on the 'just and equitable' ground requires this court to examine the petition and affidavits before it, since what is 'just and equitable' in a case must depend on its particular facts.

Since these expressions are of the widest import, they ought not to be cribbed, cabined and confined by the creation of categories within which a case must be brought in order that it will be held to be 'just and equitable' that a company be wound up.

In other words, the learned judge appreciated that findings of facts would be necessary to determine whether there was any justification to wind up the ninth respondent on just and equitable ground. And she proceeded to make some findings, namely:

(1) that the real intention of the petition was to avoid the family of the first petitioner from being sidelined in the 'Tan Chong scheme of things' and that the actual complaints of the first petitioner were hurled only towards the first respondent. And that even those complaints were mere 'domestic skirmishes' insufficient to support any allegation justifying the winding up of the ninth respondent;

(2) that there was element of bad faith in the petition in that the complaints against the first respondent were largely on his conduct or his management of the four public listed companies whereas the proper forum to settle such matters should have been by the companies themselves;

(3) that the refusal by the first petitioner to sign the circular resolution to approve the demerger of the Tan Chong Group of Companies was an unreasonable conduct in that there was careless disregard to the interests of the other shareholders in those public listed companies as the same would be jeopardized if the demerger was aborted;

(4) that the decisions made by the first respondent were all matters which were within the legitimate confines in management of a company and there was no evidence to show that the first respondent exceeded his powers for some illegitimate or ulterior purpose;

(5) that the assertion by the petitioners of the break down in the mutual trust and understanding between the two families was weakened by their own admission that they would have no problem working together with the respondents after the split of the shares in the ninth respondent;

(6) that there was a failure by the petitioners to disclose in the petition that the first to the eighth petitioners were and are in senior positions in the various companies of the Tan Chong Group. Such failure amounted to an abuse of process;

(7) that one reason for filing the petition was to enable the petitioners to unlock their minority position in the ninth respondent;

(8) that the main issue that upset the petitioners was their inability to outvote the respondents acting collectively and thus in control of the ninth respondent; and

(9) that the court was satisfied that the petition constituted an abuse of process for the grounds relied upon were unsustainable and insufficient to sustain a winding up on just and equitable ground.

With respect, it is our view that these findings are her perceptions of the situation and probably on literal reading of the exhibits annexed to the affidavits filed without the benefit of probable explanations from the contending parties. For instance, it was her own conclusion that the petitioners were afraid of being sidelined in the affairs of the Tan Chong Group. However, the point was missed in that it was the assertion of the petitioners that the management was once on a consensus basis. Hence, such a conclusion made at an interlocutory application stage should not arise. At any rate, the apprehension of being sidelined should rightly be put to the petitioners during the trial proper and not for the learned judge to assume or infer. The other glaring erroneous finding is when it was concluded that the real intention of the petitioners was to unlock their minority position. Obviously, such conclusion is derived from the content of para 103 of the petition. However, that paragraph should not be read in isolation. There was an earlier assertion in the petition of how the 5% stake went to the late Tan Sri Tan Yuet Foh and the claim for beneficial shareholding of the same. The respondents disputed such assertion and claim. Hence, with such conflict, it would not be appropriate and indeed premature for the court below to make any finding or conclusion as it did.

We also observed that nowhere in her decision did the learned judge point to any part of the petition or affidavits filed in support which she found to have failed to satisfy the requirements of the 'just and equitable' principle. For instance, this is what she said:

> As the evidence have shown, the first petitioner had harboured feelings of disquiet against the first respondent. This feeling fermented into what appeared to be intense pique even before the 11 September EGM.

A The first petitioner's subsequent complaints when viewed in his failed attempt to make first respondent agree to winding up could be seen to be motivated not by the first petitioner's desire to redress the alleged wrongs committed against him and the other petitioners but by some other reasons best known to himself. As can be seen the catalogue of complaints of the first petitioner were all against the first respondent.

B The statement of the first petitioner at para 103 of his petition is most telling. In the light of the family background it suggests several factors. The first if it is his complaints against the first respondent basically stems from the slights (imagined or otherwise) from a brash younger man.

Secondly, the stirrings of disquiet felt were largely motivated by self-interest and self-preservation and not because there exists a real breakdown of C trust and understanding.

Thirdly, and more importantly, it could be inferred that all the agitations were excited almost entirely because the first petitioner had already harboured an intention to wind up the Company and thus the failure to convince the first respondent to meet him on his term (to restructure and split the shares) seemed to seal the fate of the Company. D

Although the learned judge stated that 'evidence have shown', it was not made clear which particular evidence and from which party. And no basis was given for her finding or conclusion of 'feeling fermented' within the first petitioner. As to what motivated in the filing of the petition, the learned E judge said that it was not to redress the alleged wrongs but for other reasons best known to the first petitioner. Yet no reason was given as to why and how that conclusion was derived at. The learned judge also made a finding that the first petitioner was slighted. Obviously, that was her own assumption since there was no statement from the first petitioner that that was the case. And purely on her own conclusion that there existed no real F breakdown of trust and understanding she then went on to conclude that it was for self-preservation and self-interest that the petition was filed. Perhaps it can be summed up that substantially the approach of the court below was to justify a finding by another finding which itself was vague of any evidential basis at the interlocutory stage.

G The learned judge was also quite concerned with the affairs of the public listed companies in which the ninth respondent has interests. However, it is only the ninth respondent that will be affected if a winding up order is granted. Thus, the instant case is quite apart from the case of *Tuan Hj Ishak bin Ismail & Ors v Leong Hup Holdings Bhd and other appeals* [1996] 1 MLJ 661 where the company involved was a public listed company H and one of the factors considered by the Court of Appeal was legitimate expectations in such a company. And no doubt in *Dato' Ibrahim bin Hj Ismail & Anor v Onstream Marine Sdn Bhd & Ors* [1998] 4 MLJ 86, it was a private company where the High Court allowed the striking out of the petition. But then again, there was no indication that the company was a family company as in the present case or that there was a special I arrangement or understanding between the parties involved that could be established. And generally, courts are more inclined to characterize companies comprising of family members as belonging to the *Ebrahimi*'s

(see *Ebrahimi v Westbourne Galleries Ltd* [1973] AC 360) type of companies where the articles of association are not exhaustive or not fully reflective of the terms in the relationships or understanding between the parties. In such cases the courts will invariably subject the exercise of legal rights to equitable considerations so as to give effect the considerations of a personal character between the parties. Hence, the concept of the 'bargain' being cast in the articles of association and which cannot be rewritten by the courts will have to give way (see *Re (Saul D) Harrison & Sons Plc* [1995] 1 BCLC 14). Yet the learned judge in the present case took the view that '(T)he first petitioner's maudlin preoccupation with tradition and remembrance of things past gets in the way of the practical, pragmatic corporate governance of the day'. With respect, we are of the view that there was a failure by the court below to consider the true nature or characteristic of the ninth respondent before making such a finding. Moreover, it should be remembered that a company, private or public, has its own legal entity. Thus, any dispute amongst the shareholders of a holding company should not be assumed as having adverse repercussion on the companies in which it is a shareholder.

Accordingly, it is our view that it was premature or even presumptuous to make the findings, conclusions and inferences as the court below did when it was only at an interlocutory stage.

In respect of the other point, this is how the learned judge dealt with it:

> The tenacity of the petitioners in wanting a winding up on account of an irretrievable breakdown of 'mutual trust and understanding' between them and the respondents, is diluted, when in the next minute, petitioners were heard to have indicated that they have no problem working together with the respondents after the split.
>
> This court has difficulty in comprehending this rather perverse logic, since this translates into a situation where there could not possibly be such an irretrievable breakdown, if the parties could still work together.
>
> This brings the matter to another level and that is such being the case there seems to be a collateral purpose and bad faith in the petitioners' petition.

In short, the learned judge deemed it unnecessary to enquire if there could be any explanation for the apparent contradictions in the stance of the petitioners. In our view, it was an inappropriate approach to adopt. Surely, the petitioners should be allowed to present their side of the story and to offer an explanation where required. Indeed, as intimated earlier on, even for the change in the ratio of the shareholdings in the ninth respondent between the brothers, namely the first petitioner and the late Tan Sri Tan Yuet Foh, has differing versions depending on which family is giving. In our view, therefore, the learned judge fell into error on this point.

One other point that is quite disturbing is the purported conclusions or findings that must have been derived from the materials before the learned judge. Obviously, she must have evaluated the several affidavits filed. But that approach would then be tantamount to conducting a trial by affidavits which should not be the case. Indeed, 'in the normal way it is not appropriate for a judge to attempt to resolve conflicts of evidence on

affidavit' (see *Eng Mee Yong & Ors v Letchumanan* [1979] 2 MLJ 212). But having said the foregoing, we are well aware that it is allowable even at an interlocutory stage for the court to examine affidavit evidence and to come to certain finding where 'such assertion, denial or dispute is equivocal, or lacking in precision or is inconsistent with undisputed contemporary documents or other statements by the same deponent, or is inherently improbable in itself, then the judge has a duty to reject such assertion or denial, thereby rendering the issue not triable' (per Mohd Azmi SCJ at p 408 in *Bank Negara Malaysia v Mohd Ismail & Ors* [1992] 1 MLJ 400). However, it has to be borne in mind as well that the 'principles upon which the court acts in exercising its power under any of the four limbs of O 18 r 19(1) of the RHC are well settled. It is only in plain and obvious cases that recourse should be had to the summary process under this rule (per Lindley MR in *Hubbuck & Sons Ltd v Wilkinson, Heywood & Clark Ltd* [1899] 1 QB 86), and this summary procedure can only be adopted when it can be clearly seen that a claim or answer is on the face of it 'obviously unsustainable' (see *AG of Duchy of Lancaster v L & NW Rly Co* [1892] 3 Ch 274). It cannot be exercised by a minute examination of the documents and facts of the case, in order to see whether the party has a cause of action or a defence (see *Wenlock v Moloney & Ors* [1965] 1 WLR 1238; [1965] 2 All ER 871). The authorities further show that if there is a point of law which requires serious discussion, an objection should be taken on the pleadings and the point set down for argument under O 33 r 3 (which is in pari materia with our O 33 r 2 of the RHC) (see *Hubbuck & Sons Ltd*). The court must be satisfied that there is no reasonable cause of action or that the claims are frivolous or vexatious or that the defences raised are not arguable' (per Mohamed Dzaiddin SCJ (as he then was) at p 43 in *Bandar Builder Sdn Bhd & Ors v United Malayan Banking Corporation Bhd* [1993] 3 MLJ 36). Although the foregoing principles were stated in relation to an application pursuant to O 18 r 19 and not in the exercise of common law inherent jurisdiction, in our view there should be no distinction.

There are other subsidiary points raised by the petitioners in this appeal. However, we are of the view that even if we were to deal with them the end results would not be sufficiently material as to alter our decision in this appeal.

For the above reasons, we are inclined to agree with the contention of learned counsel for the petitioners that the decision of the court below should not be allowed to stand and we hereby set it aside. As such, this appeal is allowed with costs here and below to be taxed. Deposit paid for this appeal to be refunded to the petitioners. Subject to further appeal, this matter should be returned to the court below for fixture of trial date as soon as possible before another judge.

Petitioner's appeal allowed.

Reported by Lim Lee Na